

CROSS EXAMINATION: THEORY AND PRACTICE

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INTRODUCTION

Cross examination, like the other elements of trial practice, is a learned skill. It is not a science, it may only occasionally rise to the level of art, but it must always be a *craft*. The purpose of defense testimony is to thwart the cause of justice by putting before the jury evidence that will not aid it in reaching a proper verdict. Your cross examination should overcome that effort by challenging the accuracy, truthfulness, relevance, or dispositive nature of the defense testimony. Because your cross will depend upon the direct testimony, the exact details of which cannot be known to you before the testimony is offered, you must be flexible and prepared to adjust as circumstances dictate. However, certain principles apply generally, and some preparatory steps will almost invariably be applicable. What follows below is intended to point out some general principles and provide examples of their utility. Many, perhaps all, of these items will be known to you, but we hope that even then, the reminders are helpful.

KNOW YOUR FORUM

The most well prepared and planned of cross examinations will do you no good if you don't get to conduct it ! If you appear in front of a judge frequently, you have a head start; if not, do not be reluctant to inquire of those who are familiar with the court, or to read transcript if time permits. Take a look at his charges to the jury; how does he address the charges on credibility of a witness and prior inconsistent statements ? By time of trial you should know how tough your judge will let you be, how much you can lead, whether you must seek permission to inquire,

and whether he permits speaking objections. You may also have a guide to your opening that will lead to your cross, and then to your closing and the judge's charge to the jury.

KNOW THE WITNESSES - KNOW YOUR OWN CASE

Often defense witnesses will only have been familiarized with their portion of the case, and lack a grasp of the larger context. Take advantage of this. Expose to the jury the witness' ignorance. Be prepared to call a rebuttal witness for direct contradiction.

KNOW THE POSSIBLE DEFENSES

As you know, there are really only 3 categories of defenses to a crime:

1. No crime occurred.
2. It wasn't me.
3. I have an excuse.

So consider the possible defense testimony in light of the likely defense strategy. Will the defense testimony attempt to challenge the truthfulness of the prosecution witnesses, and likely challenge their motives, or will it focus on an element of the capacity of one or more of the witnesses ?

CONSIDER POSSIBLE MOTIVES OF THE DEFENSE WITNESS

What is the relationship of the witness to the defendant, another witness, the victim, the police, etc. ? Some witnesses' motives are clear, e.g., the defendant's mother. Other witnesses motives are less obvious; some may dislike the police, or another witness, or the victim. In high profile cases, some defense witnesses may just wish to enjoy some moments of fame or notoriety.

AVOID JARGON - USE PLAIN LANGUAGE

I think that it is unlikely that the jury will be impressed by your use of arcane or highly technical language, or even expressions common to a particular job or profession. Some police officers seem to only “exit their vehicles.” I prefer that they get out of their cars. Using terms of art, or complex language may make you seem erudite or intelligent, it may also puzzle your jury. Hint: Do NOT use the word erudite !

PRIMACY AND RECENCY - START AND FINISH WELL

Once you have learned your case, considered all the possible defense witnesses, considered the forum, and thought about defense counsel, then try to plan at least a portion of your cross exam of potential defense witnesses. And when you do so - plan on making your first question count: “Just so we understand each other, sir, in your first statement to the police, your first opportunity to explain what you knew, you lied consistently, isn’t that so ?” And may we start with that understanding ? And remember, tapering off to a mumble while shuffling your notes rarely impresses the jury, so finish strong, too, if at all possible.

FOR THE LOVE OF GOD - DO NOT MERELY HAVE THE WITNESS REPEAT THE DIRECT EXAMINATION !!!! UNLESS IT WAS TRULY DERANGED !

But you may want to cause the witness to repeat or agree to the direct in abbreviated fashion (remember to lead) - right up to the “fork in the road.” Absent a very good reason, causing or allowing the defense witness to repeat his direct examination is pointless and could be very damaging. DON’T DO IT !

USE THE COURTROOM GEOMETRY

Are you in front of a judge who “pins you to the podium?” Or can you move around ? I find that some movement is useful to refocus the

jury and keep them concentrating on the testimony. But don't overdo it - that's distracting. Always remember that whenever you are speaking, the jury is, or should be, looking at you. Unless you have a reason to want them to look elsewhere. Where do you want them to look now, and next ? And do you want your examination, whether direct or cross, to look like a tennis match , with the jurors heads looking first one way then the other ? I would suggest that this is sometimes unavoidable, but that it can be minimized. Why have them look at you ? Do not be reluctant to ask the witness if he needs to talk to his lawyer.

KNOW WHEN TO BE SILENT

When a witness has given you an answer that is useful to your case, that may very well be the moment to give the jury some time to consider it. In addition, sometimes the witness will betray his realization that he has made a mis-step, and will underline the error by attempting to explain, and then dig himself a deeper hole. I have also occasionally begun my cross by looking over my notes for a minute or two, just to let the witness sit there for a while. This may be useful with a witness who is uncomfortable just sitting there, looking at the jury.

LISTEN TO THE WITNESS - ON DIRECT AND CROSS

This should go without saying, but I have more than a few times watched a trial lawyer spend time looking over notes while the witness he was about to cross examine testified on direct examination. You should be so prepared with your knowledge of the case that you can focus intently on the witness' direct testimony. Be aware of the response of other persons to the direct. If possible, and if you trust someone, ask them to observe the jury, the judge, defense counsel and the defendant for their responses. E.g. Sometimes you will see one juror in particular who is giving signs of skepticism about the defense direct, or some portion of it - play to that juror, subtly - but reinforce that which made him or her skeptical. Or defense counsel may wince at a response - always a good sign !

ATTEND CLOSELY TO DEFENSE CROSS EXAMINATION OF YOUR WITNESSES FOR KEYS TO THE COURT'S APPROACH TO YOUR CROSS. CONSIDER YOUR OBJECTIONS TO HIS CROSS IN THAT LIGHT.

This is where knowing your forum is important - will the judge conclude that your allowance of some leeway to defense in his cross exam of your witnesses should cause him to allow you the same consideration ?

CONSIDER YOUR POSSIBLE OBJECTIONS ON DEFENSE DIRECT OF HIS WITNESSES IN LIGHT OF YOUR PLANNED CROSS EXAMINATION.

See above.

SEEK CONCESSIONS FROM THE WITNESS

Make the witness repeat points from his direct testimony that are consistent with a useful element of your case or your witness' evidence. With experts, if possible, make them agree with the qualifications of your expert. Make them concede that they have erred in the past - who hasn't ?

CONTROL THE WITNESS - LEAD THE WITNESS

I am a great believer in approaching witnesses on cross exam with courtesy and a cordial manner - generally. However, do not allow the witness to wander or deliver a narrative. Stop the witness, if you can, but make it clear why you do so. Repeat the question if necessary. Thank the witness for answering the question he hoped you'd ask.

Explain that the only acceptable answers must begin with

Yes.

No.

I don't know./I'm not sure. ***AND MAKE SURE THAT YOU FRAME YOUR QUESTIONS SO THAT IS TRUE !***

LEAD THE WITNESS - BUT DO NOT MISLEAD !

It is always both fair and proper to lead the witness on cross examination. However, you must *never, never, never*, mislead the witness by mis-stating the testimony, or by posing a question not supported by a good faith belief in its premises ! That is wrong to do, and the jury will hold it against you, perhaps fatally. Be fair - you're on the right side!

THE ELEMENTS OF WITNESS TESTIMONY

Perception - Example - "Yeah, but I'm high a lot. It don't trouble me."

Comprehension - Is the witness an idiot ?

Example - "15 minutes, or maybe 30 seconds."

Recollection - Example - Carl Moon and his Aunt.

Articulation - Example - "It was an ordeal."

WHEN DO YOU WISH YOUR CROSS TO HAVE ITS IMPACT ?

Now ? Sometimes a witness' response on cross will be so damaging to his credibility that you will have effectively eliminated any benefit the defense may have derived from their direct examination. If so, and it is evident at the time - STOP ! More often, the damage done to the defense by your cross may have its full effect only after other testimony, or as you close, when you "connect the dots." Be alert in preparation for the timing of different impacts. And remember - not every useful and damaging answer needs to be followed by an "AHA !" The jury isn't voting after your cross. Most often it is sufficient that you have scored and they remember. That being said, I am not above asking a witness to repeat a damaging answer !

AVOID ARGUING WITH THE WITNESS

“Did Not ! Did too !” is not an attractive tone to take. And for gosh sakes, do NOT nit-pick. If a witness says he was 10 feet away from the bar and you can demonstrate that he was 8 and a half feet away, it is rarely useful to act as if you have caught him in an outrageous lie ! I will often use the “Best you can do ?” form for questions like that, This often has the benefit of undercutting the witness’ credibility when he is “absolutely certain” of other things.

KEEP THE THEATRICALS TO A USEFUL MINIMUM AND THE VOLUME, TOO !

Jurors often say that they are put off by overly loud or dramatic lawyering. Actually, I don’t think that’s always true, sometimes jurors are looking for some drama, but as a general rule, chewing up the scenery comes across as forced and phony. But, hey, it’s your personality that you’re working with, so if you’re sincere, so be it. Just remember what an old guy in Italy told me - “It’s okay to get mad, and it’s okay to act mad - but don’t ever *act* mad *just* cause you *are* mad.” And remember that the jury may be - should be - focusing intently on you as you inquire. Your response to a witness may be magnified to them, so don’t pull an Al Gore, and sigh loudly, or gesticulate madly ! An arched eyebrow, or a short pause may be all that you need to convey righteous frustration at the duplicitous witness. And changing your tone just for cross may not cause the jury to infer you are properly indignant, it may instead cause them to believe that you are bi-polar !

Same thing with the volume at which you speak. Raising the volume at which you speak to the witness, defense counsel, or, God forbid, the judge, is never something which you should do spontaneously.

BE VERY CAUTIOUS ABOUT USING HUMOR

While I think it is almost always appropriate and useful to at least simulate courtesy and genial good humor, it is wise to be very, very, cautious about attempting wit or humor. I had a friend who had a burglary case where the guy got stuck in a chimney. Humor in that - fine. In a shotgun double murder - maybe not so much. Then again....

WITH EXPERT WITNESSES - CHOOSE YOUR BATTLEFIELD - DON'T FIGHT ON THEIRS.

Do not expect to defeat most experts by a frontal assault on their expertise or even their analysis, though this may occasionally be possible. You are much more likely to defeat expert witnesses by attacking their data base. And do make sure to seek their concession of the reasonableness of your expert's opinion, as well as an agreement that he is well qualified, etc. But remember, you can always know more of the facts than the expert - go to the scene, examine the evidence, make your expert read or do more.

BE BRIEF - KNOW WHEN TO STOP - LESS IS MORE

We have all heard the stories of the lawyer who asks one question too many on cross-exam. And they are many - because it is true. Better to leave the potentially brilliant question unasked than risk the catastrophic answer to the foolishly uttered query. And by the way, if you are saving a brilliant question for the third hour of your cross - forget it ! They are already napping. Cross examination is not supposed to be an endurance contest.

SPEAKING OF ENDURANCE CONTESTS AND KNOWING WHEN TO STOP.....

Thank you for your kind attention, and the pleasure of being here.
We look forward to any questions or comments.